McNUTT LAW GROUP LLP
SCOTT H. McNUTT (CSBN 104696)
MARIANNE M. DICKSON (CSBN 249737)
188 The Embarcadero, Suite 800
San Francisco, California 94105
Telephone: (415) 995-8475
Facsimile: (415) 995-8487

Attorneys for Peacock Gap Properties, LLC

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re

PEACOCK GAP PROPERTIES, LLC,

Debtor.

Case No. 09-34161 TEC

Chapter 11

**MOTION FOR APPROVAL OF SALES PROCEDURES, INCLUDING OVERBID PROCEDURES IN CONNECTION WITH PROPOSED SALE CONTEMPLATED IN DEBTOR'S FIRST AMENDED PLAN OF REORGANIZATION**

Date: January 18, 2011
Time: 11:00 a.m.
Place: 235 Pine Street
Courtroom 23
San Francisco, California

Peacock Gap Properties, LLC (the "Debtor"), the debtor and debtor in possession in the above captioned case, hereby moves (the "Motion") for an order approving the proposed overbidding and noticing procedures in connection with the sale of substantially all Debtor's assets free and clear of liens that is contemplated to occur in connection with confirmation of the Debtor's First Amended Plan of Reorganization (the "Plan"). In support of the Motion, the Debtor submits as follows with the supporting declaration of Jack D. Rose (the "Rose Dec."):

## I. INTRODUCTION

Debtor has proposed an amended plan that proposes to resolve this case with a sale of substantially all its assets, including its real property, to its secured creditor, First Century Plaza, LLC ("First Century"), or First Century's affiliate. The consideration is a credit bid of all or some of First Century's first and second priority deeds of trust secured by the Debtor's real property, payment of property taxes secured by the Debtor's real property and up to $300,000 in cash. First Century also proposes to hire all of Debtor's current employees, honor Debtor's annual golf country club memberships, give credit to Debtor's lifetime golf country club memberships against future membership fees, and to pay a retention bonus to ensure the CEO's cooperation and assistance with the transition of the Debtor's business to First Century or its affiliate as the buyer.

In order to ensure that the sale consummated through the Plan represents the best deal possible for Debtor's creditors, Debtor proposes an overbid procedure pursuant to which Debtor will seek out overbids, to determine if a higher and better overbid can be obtained. To add certainty to the process and encourage interested parties to bid, Debtor seeks approval of the sales procedures in connection with the hearing on approval of Debtor's First Amended Disclosure Statement (the "Disclosure Statement"). Debtor intends that the sale of all its assets shall be part of confirmation of the Plan.

## II. FACTUAL BACKGROUND

Debtor owns and operates an 18-hole, par 71 golf course, complete with a driving range, a two level 26,000 square foot clubhouse, including a Pro Shop, restaurant, bar, golf cart storage, administrative offices and storage area, along with a 5,000 square foot maintenance facility, and a partially completed 2,800 square foot new golf services building on approximately 137 acres of commercial land situated near China Camp in San Rafael, Marin County, California (the "Golf Course"). The Golf Course was opened in approximately 1959 and was acquired by the Debtor in or about April 2005, for a purchase price of $10 million, with about $2 million in equity and about $8 million borrowed (the "Acquisition Loan") from Nara Bank ("Nara") secured by a first priority deed of trust upon the real property. The Golf Course is located at 333 Biscayne Bay Drive, San Rafael, California 94109 (the "Real Property").

The Golf Course is in need of substantial renovations. Beginning in about July 2006, Debtor and Nara began negotiations for a construction loan from Nara to Debtor for substantial renovation work at the Golf Course. In August 2006, Nara approved and offered Debtor a construction loan in the approximate amount of $8 million, which Debtor accepted. On the strength of the representation of this $8 million construction loan, Debtor closed certain facilities for renovations, expended about $2.5 million in land improvements, and hired construction contractors, architects, and engineers. Unfortunately, in about May 2007, Nara refused to fund the $8 million loan and agreed only to fund a $3.2 million loan (the "Construction Loan"), leaving Debtor unable to complete construction and facing financial ruin.

Nara then commenced non-judicial foreclosure proceedings and a foreclosure sale was scheduled for January 4, 2010. Nara's foreclosure was based upon the deeds of trust securing the Acquisition and Construction Loans. Shortly before the scheduled foreclosure sale, Debtor filed for protection under Chapter 11 of the Bankruptcy Code on December 30, 2009.

The most recent appraisal (the "Appraisal") of the Golf Course as a going-concern, including the Real Property, dated January 27, 2010 valued the Golf Course at $5,150,000. The Real Property has the following purported Secured Claims:

| Description | Approximate Amount | Notes |
|---|---|---|
| Real Property Tax | $531,265.54 | Per Marin County's proof of claim filed 10/13/2010 (Claim No. 8)[1] |
| First Priority Deed of Trust | $11,463,146.01 | To secured payment under Acquisition Note, recorded 4/22/05 |
| Second Priority Deed of Trust | | To secured payment under Construction Note, recorded 5/30/07 |
| Mechanic's Lien Recorded 10/7/09 | $378,906.00 | Mechanic's lien of McDevitt & McDevitt Construction, Corp. |
| Mechanic's Lien Recorded 10/23/09 | $186,892.43 | Mechanic's lien of McGinnis Chen Associates, Inc. |
| Mechanic's Lien Recorded 10/30/09 | $47,525.67 | Mechanic's lien of Donald A. Blayney & Associates |
| Mechanic's Lien Recorded 11/30/09 | $48,837.78 | Oberkamper & Associates |

First Century has recently succeeded to all of Nara's right, title and interest under the Acquisition Loan (secured by a first priority deed of trust) and Construction Loan (secured by a

[1] Debtor believes the real property tax is approximately $410,000, which is significantly less than $531,265.54, and expects to resolve this discrepancy before Confirmation.

second priority deed of trust).

**A. Debtor's Current Financial Situation**

Debtor is now in the off-season for golfing. Revenues are insufficient to maintain the on-going operations and Debtor is already operating with minimal staff and a minimal budget. It would not save any further money by closing its doors as it would still need to hire staff to maintain the greens, which preserves the value of the Golf Course. By keeping its doors open, the Debtor is able to generate some income to offset the costs it otherwise must incur to maintain the property and preserve the value of the business as a going-concern.

Because Debtor is unable to continue operations without additional funding, Debtor recently received post-petition financing from First Century on a final basis in the amount of $150,000 (the "DIP Loan"). As a condition of the DIP Loan, Debtor was required to hire an interim manager, and an order approving Rajiv Parikh as interim manager was entered on December 13, 2010.

Debtor's books and records are in disarray and are insufficient at this point to give an adequate picture as to Debtor's complete financial situation. However, Mr. Parikh has indicated that the Debtor is not cash flow positive and will need continued financial assistance to make it through the winter season.

**B. The Proposed Sale**

The sale proposed under the Plan of the Golf Course is to be free and clear of all liens. The consideration paid by First Century will be a credit bid of some or all of its secured debts and a cash payment calculated as follows: (1) payment of legitimate real property taxes not to exceed $415,000 unless otherwise agreed to by Purchaser, and (2) $250,000 in cash to be applied toward administrative claims and such other claims by order of priority (the "Cash Proceeds"). If, however, the administrative claims exceed $250,000, then First Century shall increase the $250,000 by an amount necessary to pay the administrative claims in full, but in event shall the Cash Proceeds exceed $300,000. Except as otherwise set forth in the Plan, Purchaser will not assume or be deemed to assume any obligations or liabilities of the Debtor, the estate, or any other person or entity. A copy of the proposed agreement for the sale of the Golf Course is attached hereto as **Exhibit A** (the "Proposed APA").

## III. PROPOSED OVERBID PROCEDURES

The Debtor proposes the following procedures to allow for overbids for the same package of assets proposed to be sold to First Century through the Plan:

1. The initial overbid must provide at least $50,000 additional cash consideration to the Debtor's bankruptcy estate.

2. The terms and conditions of the sale can be no less favorable than the terms and conditions proposed by First Century and cannot materially negatively affect any creditor. Bids must be for the same assets contemplated to be sold to First Century under the Plan. ***However, the consulting fee proposed to be paid by First Century as part of its purchase price is not required of any over bid, and the failure to do so will in no way affect the competitiveness of any bid.***

3. Overbids shall be submitted in writing and be irrevocable and unconditional and shall be subject only to Bankruptcy Court approval. Initial overbids must be submitted to counsel for the Debtor via personal delivery, facsimile, or email, so as to be received no later than 5:00 p.m. PST on the date that is seven (7) days prior to the hearing on confirmation of the Plan.

4. Bids cannot be contingent upon (i) financing, (ii) the completion of unperformed due diligence, (iii) the approval of bidder's board of directors or other internal approvals or consents, or (iv) the absence of any material adverse change. Bids cannot request any breakup fee, topping fee, broker's fee, expense reimbursement, or similar type of payment or credit. Bids must be accompanied by a deposit in the amount of $100,000.00 made by wire transfer, certified check, or cashier's check (the "Deposit"), which is refundable if the bidder is unsuccessful.

5. If no overbid is received, First Century will be the successful bidder, and Debtor will be authorized by the Court to enter into the Proposed APA.

6. If an acceptable overbid is received as a result of this bidding process, then three (3) days prior to the hearing on confirmation of the Plan, Debtor will file a pleading with the Court identifying the successful bidder (the "Successful Bidder") disclosing the terms and conditions of the bid, the identify of the post-confirmation ownership and management of the Successful Bidder if not already disclosed, any modifications to the treatment of creditors proposed in the Plan

necessitated by the acceptance of the overbid. If the successful bidder is unable to consummate the transaction, then the Deposit shall be forfeited and become property of the Debtor's estate.

7. Debtor reserves the right, in its sole discretion and subject to Court approval, to designate a second best bid as the back-up bid, which shall become the successful bid if the Successful Bidder fails to consummate the sale.

8. Any party that needs to conduct due diligence prior to submission of its bid by the deadline set forth above may do so my contacting counsel for Debtor by telephone or email. Once a confidentiality agreement is signed, parties will be permitted to conduct due diligence.

## IV. LEGAL ARGUMENT

Bankruptcy courts routinely exercise their discretion in approving reasonable sale procedures, including overbid procedures, break-up fees, and other mechanisms intended to promote bidding and to ensure that the same is effectuated according to principles of good faith and fair dealing. *See, e.g.*, In re Integrated Resources, Inc., 135 B.R. 746-750-51 (Bankr. S.D. N.Y. 1992); In re Mama's Original Food, Inc., 234 B.R. 500,505 (C.D. Cal. 1999). The Court's authority to approve sale procedures lies within the Court's power to issue any order that is necessary or appropriate to carry out a sale under 11 U.S.C. § 363(b). *See* 11 U.S.C. § 105(a). Bid procedures should stimulate bidding to obtain the highest value and not discourage competition. *See* Mama's Original Food, 234 B.R. at 505.

Courts have routinely held that when assets are sold in bankruptcy on a competitive bidding basis, it is appropriate to require parties submitting competitive bids to submit bids that exceed existing bids by a specified minimum amount. See Consumer News and Bus. Channel P'ship v. Dow Jones Group W Television Co. (In re Financial News Network, Inc.), 931 F.2d 217, 219 (2d Cir. 1991) (requiring overbids to exce ed the initial purchase price by 9.5%); Doehring v. Crown Corp. (In re Crown Corp.), 679 F.2d 774, 775 (9th Cir. 1982) (requiring overbids to exceed the initial purchase price by 4.9%).

The Debtors believe that the proposed bid procedures will encourage and facilitate bidding by providing a specific process for the submission of bids by interested parties. In the absence of these procedures, there would be uncertainty about the ability to submit a bid or the process for conducting due diligence, and it is the Debtors' goal to make this process as easy as possible. This process is intended to give prospective buyers notice that this is their last opportunity to submit a bid. The proposed bid increments are intended to ensure that the estate benefits from overbids because, if overbids are received and accepted, additional work will be required of counsel for the Debtors in connection with facilitating due diligence, monitoring the bidding process, and seeking approval of any modifications to the Plan necessitated by the accepted overbid.

## V. CONCLUSION

Based on the foregoing, Debtor respectfully requests the entry of an order granting the Motion, approving the proposed bid procedures, approving the Proposed APA, and ordering such other and further relief as the Court may deem just and proper.

Dated: December 29, 2010

Respectfully submitted,

MCNUTT LAW GROUP LLP

By: */s/ Marianne M. Dickson*
Marianne M. Dickson
Attorneys for Peacock Gap Properties, LLC